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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

W. H. MOSELEY COMPANY, INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

(1) Whether certification of a claim pursuant to 6(c)(1) of the Contract Disputes Act of 1978 (41 U.S.C. § 605(c)(1)) is a jurisdictional prerequisite to an appeal to the Court of Claims of a contracting officer's decision?

(2) Whether certification must take the form of a personal statement by the contractor which simultaneously, expressly recites the assertions set forth in 41 U.S.C. § 605(c)(1), or whether the contracting officer has the discretion and authority to reasonably determine the adequacy of the certification of good faith and accuracy from the claim and its supporting data?

(3) Whether, since the contracting officer processed the claim and issued a "final decision," the respondent is estopped from claiming that adequate certification is lacking?

(4) Whether, by filing a formal certification of claim after the decision by the contracting officer, the petitioner-contractor can cure any such lack of jurisdiction in the Court of Claims arising from the failure to file such certification prior to the contracting officer's decision?

(5) Whether the judgment and opinion below results in creating a procedure which defeats the purpose of the Contract Disputes Appeals Act by denying the availability of appeal from decisions of contracting officers to the Court of Claims?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari be issued to the United States Court of Claim to review the case of *W. H. Moseley Company, Inc., v. United States*, No. 56-81C.

ORDER AND OPINION BELOW

The order issued by the United States Court of Claims on March 23, 1982, and the opinion decided by the United States Court of Claims on April 21, 1982, in Case No. 56-81C, from which review is sought by this petition, are not yet reported to petitioner's knowledge. A copy of this order is included in the Appendix as Exhibit A, and a copy of this opinion is included in the Appendix as Exhibit B.

JURISDICTION

In an appeal by petitioner-contractor to the United States Court of Claims from an adverse decision by a contracting officer, the Court of Claims granted the government's motion for summary judgment on grounds of lack of jurisdiction. Jurisdiction of this Court to review the order and opinion of the United States Court of Claims is founded upon 28 U.S.C § 1255(1) and 28 U.S.C. § 2101(c). The order was issued on March 23, 1982, and the opinion was decided on April 21, 1982.

STATUTES AND REGULATIONS INVOLVED

Section 6 of the Contract Disputes Act of 1978 ("the Act"), Public Law No. 95-563, 92 Stat. 2383, *et seq.*, codified at 41 U.S.C. § 605, provides as follows:

> § *605. Decision by contracting officer — Contractor claims*
>
> (a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a

claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

Review; performance of contract pending appeal

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

Amount of claim; certification; notification; time of issuance; presumption

(c)(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2)A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 —

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a speci-

fied period of time, as determined by the board, in the event of undue delay on the part of any contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

Section 7 of the Act, Public Law 95-563, 92 Stat. 2385, codified at 41 U.S.C. § 606, provides as follows:

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

Section 10(a)(1) and (3) of the Act, Public Law No. 95-563, codified at 41 U.S.C. § 609(a)(1) and (3), provides as follows:

§ 609. Judicial review of board decisions — Actions in United States Court of Claims; district court actions; time for filing

(a)(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

Section 16 of the Act, Public Law No. 95-653, set out as a note under 41 U.S.C. § 601, provides as follows:

This act shall apply to contracts entered into 120 days after the date of enactment. Notwithstanding any provision in a contract

made before the effective date of this act, the contractor may elect to proceed under this act with respect to any claim pending then before the contracting officer or initiated thereafter.

At the time the "final decision" was rendered in this matter by the contracting officer (February 6, 1980), the Department of Army regulations did not prescribe any particular form for the certification required under 41 U.S.C. § 605(c)(1). Likewise, the regulations did not specify the time and manner for providing such certification nor did they require that the factual elements of the certification necessarily be filed in a single document.[1]

STATEMENT OF THE CASE

Petitioner is a commodities supplier located in Boise, Idaho, who deals principally in french fried potatoes. On January 31, 1978, petitioner was awarded Contract No. DLA 137-78-C-CH32 to supply a certain quantity of french fried potatoes to the Defense Logistics Agency ("DLA"). Petitioner performed under the terms of the contract and on February 22, 1978, and on March 2, 1978, submitted a value engineering change proposal ("VECP") recommending that the DLA accept a modification of the color requirements of french fries purchased by the DLA. The DLA adopted the VECP recommended by the petitioner, but denied any monetary award on grounds that the VECP did not result in the requisite savings to the government. Petitioner claims that substantial savings to the government occurred as a direct result of the adoption by the DLA of the VECP submitted by petitioner.

Following acceptance and adoption of petitioner's VECP, petitioner continually responded to the government's changing reasons for denial of an award and did so with extensive memoranda, exhibits and economic evaluations prepared by an economist. The factual point desired to be emphasized here is that the record clearly shows petitioner fully established the actual *bona fides* of the claim for a VECP award, which *bona fides* the government claims can only be established by a single, formal document of certification filed by the contractor.

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[1]On January 25, 1980, almost six months after the subject "final decision" by the contracting officer, DAR 1-314 was amended so as to provide that a claim must be certified by the individual contractor or by an officer or a senior official of a contractor which is a corporation or a partnership.

Finally, under cover of a letter dated June 15, 1979, petitioner submitted an extensive legal memorandum with exhibits and a supporting economic evaluation and characterized the enclosures in the letter as "final documentation required by paragraph J17(b) . . . ", a copy of which letter is included in the Appendix as Exhibit C. These extensive memoranda and studies commissioned by petitioner continued to further express petitioner's bona fide effort to accurately reflect its claim to the best of its knowledge and belief. Still, the DLA did not render a "final decision." By letter dated July 25, 1979, a copy of which is included in the Appendix as Exhibit D, the DLA responded to petitioner's memoranda and economic evaluation by stipulating to certain facts, denying any award at that time, and inviting more information relative to certain facts. By letter dated July 30, 1979, a copy of which is included in the Appendix as Exhibit E, petitioner replied to the DLA's response and confirmed that the DLA's response was not "final" and that the petitioner intended to pursue the invitation to provide more information along the lines suggested in the response. By cover letter dated September 22, 1979, a copy of which is included in the Appendix as Exhibit F, petitioner submitted an extensive supplementary memorandum in support of its claim, exhibits and supporting data, and a supplemental economic evaluation of comparative data prepared by an economist. By letter dated October 29, 1979, a copy of which is included in the Appendix as Exhibit G, the contracting officer acknowledged receipt of the supplementary memorandum and economic study and indicated that the research involved and statistical data required to properly evaluate petitioner's VECP would be substantial and time-consuming, thereby postponing an estimate of the completion date of the DLA's evaluation. By letter dated November 29, 1979, a copy of which is included in the Appendix as Exhibit H, petitioner again inquired of the DLA whether it could estimate the time for completion of the evaluation of petitioner's award application. In this letter, petitioner again expressed the desire to provide "any further information or documentation in any particular area of our proposal" such as the DLA might desire, in order to "facilitate the proper and full consideration of this matter at the administrative level." By letter dated December 1, 1979, a copy of which is included in the Appendix as Exhibit I, the contracting officer advised petitioner that, "considerable time and effort" was being devoted to the task of evaluating petitioner's submissions and that a final decision would not be forthcoming for approximately two months. There is no further request for further data

or information in response to petitioner's letter of November 29,1979. By letter dated January 30, 1980, a copy of which is included in the Appendix as Exhibit J, the contracting officer advised petitioner that a final decision on the evaluation of award claim would be completed by a specific date: February 8, 1980. There were no more requests from the DLA for further information or for any further "certification." The letter from the DLA dated January 30, 1980, was presumed by petitioner to constitute notice pursuant to 41 U.S.C. § 605(c)(2)(B) of the time within which a decision would be issued on a fully "submitted certified claim."

On February 6, 1980, the contracting officer issued her "final decision" denying petitioner's claim, a copy of which opinion is included in the Appendix along with her opinion date correction letter of February 15, 1980, as Exhibit K.

On October 9, 1980, petitioner filed an appeal of the contracting officer's decision in the United States Court of Claims, which appeal was docketed as Number 546-80C. The government moved to dismiss the case for lack of subject matter jurisdiction due to failure of petitioner to file an adequate certification. On December 31, 1980, petitioner sent to the contracting officer a letter of certification reciting the statutory averments as set forth in 41 U.S.C. § 605(c)(1), a copy of which letter of certification is included in the Appendix as Exhibit L. On February 3, 1981, petitioner filed a second appeal of the same decision of the contracting officer, which appeal was docketed as Court of Claims No. 56-81C, and which is the subject of the appeal to this Court. The prior appeal, Court of Claims No. 546-80C, was dismissed by agreement of the parties.

On August 25, 1981, respondent filed its motion for summary judgment on the grounds that the Court of Claims lacked subject matter jurisdiction over petitioner's claim on the grounds that said claim had not been adequately certified. Following briefing by both parties, the Court of Claims entered its order on March 23, 1982, granting respondent's motion for summary judgment (Appendix, Exh. A) and handed down an opinion in support thereof dated April 21, 1982 (Appendix, Exh. B).

With attention to the Court of Claims' holding on page 4 of its order (Appendix, Exh. A) that "contracting officers are not empowered to 'waive a requirement that Congress imposed'", petitioner, by

letters dated April 12 and April 20, 1982, requested the contracting officer to issue a final decision on its now certified claim, copies of both of which letters are included in the Appendix as Exhibit M. By letter dated April 15, 1982, a copy of which is included in the Appendix as Exhibit N, the contracting officer responded that the matter had been "submitted for legal review and advice." Then by letter dated May 14, 1982, a copy of which is included in the Appendix as Exhibit 0, the contracting officer responded to petitioner's letters of April 12 and April 20, 1982, with the opinion that "a valid final decision in this matter was issued to the W. H. Moseley Company on 6 February 1980, under the disputes clause of the contract."

ARGUMENT

I

CERTIFICATION OF A CLAIM PURSUANT TO 41 U.S.C. § 605(c)(1) AND (2) IS NOT A JURISDICTIONAL PREREQUISITE FOR BRINGING AN ACTION DIRECTLY ON SUCH CLAIM IN THE UNITED STATES COURT OF CLAIMS UNDER 41 U.S.C. § 609(a)(1) AND (3).

Petitioner urges this Court to reverse the opinion of the Court of Claims below that "certification of a claim pursuant to Section 6(c)(1) of the Contract Disputes Act of 1978 (Act) is a jurisdictional prerequisite to a direct challenge in this court of a contracting officer's decision" and to overrule that court's identical decision on this issue in its recent opinion in *Paul E. Lehman, Inc. v. U.S.*, Ct. Cl. No. 270-81C (slip op. Feb. 24, 1982). On page 4 of its order of March 23, 1982 (hereinafter "order"), the court below referred to its "detailed analysis in *Lehman* of assertions identical to plaintiff's above contention" and then concluded as follows:

> After reviewing the act's legislative history and the mechanics of the statute, we conclude that 'the import of the language of the act and its legislative history is that unless a claim has been properly certified it cannot be considered under the statute. * * * Unless that requirement is met, there is simply no claim that this court may review under the act.' *Paul E. Lehman, Inc. v. U.S., supra*, at 5.

As this Court can plainly see when comparing the language of Section 609(a)(1) and (3) with the language of Section 605 (c)(1) and

(2), there is simply nothing in the language of these provisions or that can be inferred from construing them together that would serve to make certification a jurisdictional prerequisite of proceeding on the claim in the Court of Claims. At most, the certification requirement would appear to be a prerequisite to obtaining a decision from a contracting officer. Section 605(c)(2) provides that "a contracting officer shall, within sixty days of receipt of a submitted *certified* claim over $50,000 — (A) issue a decision; or (B) notify the contractor of the time within which a decision will be issued" (emphasis supplied). Petitioner submits that the most reasonable interpretation of Subsections 605(c)(1) and 605(c)(2) is that the contracting officer is not required to consider a claim in an amount over $50,000 until he is satisfied that the elements of certification have been reasonably met by the contractor; i.e., that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which liability is claimed. The language of the statute setting out the elements of what the contractor shall certify does not prescribe the form of such certification, does not require that the items to which the contractor must certify be simultaneously certified to, or ever certified to on a single paper. The Act's legislative history makes it quite clear that the manner, form, detail and specificity of the "certification" is left to the contracting officer's discretion. Moreover, it should be noted that the word "certification" (which perhaps would imply a single act or document) is not used in the Act. The Act merely provides that "the contractor shall certify" certain items of information for claims of more than $50,000.

Petitioner further submits that once the contracting officer has issued a decision on a claim of over $50,000, such claim is either a certified claim or the decision is not a valid final decision. With regard to claims over $50,000, Section 605(c)(2) authorizes a contracting officer to issue decisions on certified claims only. The government cannot have it both ways on this point. Either the final decision of a contracting officer on a claim in excess of $50,000 is a valid, final decision for all purposes, including appeal, or it is not a final "decision" under the Act.

A review of the legislative history of the Contract Disputes Act of 1978 as set forth in U.S. Sen. Rpt. No. 95-1118 (hereinafter "Sen.

Rpt.")[2] strongly supports the proposition that the "certification" requirement is not jurisdictional in nature. The purpose of the Act is to create a "fair, balanced and comprehensive statutory system of legal administrative remedies in resolving government contract claims" (Sen. Rpt. p.1), as opposed to the previous "unplanned" system of contract remedies arising from unstructured reactions to various events and decisions and resulting in "procedures that are restrictive and uncoordinated." (Sen. Rpt. p. 3) The legislative history leaves no doubt that it was the intent of Congress to get rid of the very type of formalistic restrictions on claims that is imposed by the court below in the present case and in *Lehman v. U.S., supra.* See Sen. Rpt. pp. 4-11. The first item under the section entitled "Discussion of Key Issues" in the Senate's report[3] addresses "direct access to the court" and stresses the need to get rid of the forms and procedures which "unnecessarily confuse and delay the resolution of disputes" (Sen. Rpt. p. 12). Also specifically listed and addressed in the discussion of key issues in the Senate report is the issue of "decision by the contracting officer" (Sen. Rpt. pp. 21-22). The contracting officer is given new power to settle on their legal and contractual merits all disputes arising in connection with contracts under the Act. With this authority must come the discretion of judging whether a contractor has sufficiently certified the elements of his claim as required under Section 605(c)(1). This grant of discretionary authority in conjunction with these new powers is further supported by the statutory requirement at Section 605(c)(2) that any decision on a claim over $50,000 must be a "submitted certified claim."

Finally, the Senate report stresses that equally important to the decision-making role of the contracting officer is a thorough knowledge by the contractor of the role and authority that the contracting officer plays in the decision-making process of the agency he represents. (Sen. Rpt. p. 21) This importance was highlighted as Recommendation No. 1 in the Procurement Commission's Report (Sen. Rpt. p. 21). However, with so many variables of expertise and subject matter among the agencies, "it is impossible to generalize as to what the contracting officer's role should be in all situations" (Sen. Rpt. p.21). Faced with this need to intelligently advise the contractor of the role and authority of the contracting officer in specific cases in light of the impossibility to generalize that role in all situations, Congress expressly intended that

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[2] 1978 U.S. Code Cong. & Admin. News, page 5235, *et seq.*

[3] Sen. Rpt. pp. 11-12.

the authority to determine the contracting officer's role and decision-making authority in specific cases should reside in the specific procuring agency involved. The highest importance was then placed upon the responsibility of the agencies to make that role and authority of the contracting officer clear to the contractor. In this respect, the Senate report at page 22 states:

> Thus, in the disputes and remedies area, the procuring agency should have flexibility in deciding what role the contracting officer will have. Most importantly, the agencies, whatever role they decide to give the contracting officer, *must make clear that role to the contractor.* Thus. if for one reason or another, the contracting officer is not the primary decision-maker on a contract matter, *the government must tell the contractor this,* and tell the contractor who is making the decision. From this course of action the contractor will at all times know with whom he is dealing in matters under dispute.
>
> It is expected that procedures will be established by the agencies to carry out this recommendation and course of action (emphasis supplied).

From the above it is clear that the authority for establishing the procedures for certification resides in the agency and that the agency must advise the contractor of such procedures in the individual claim. With reference to the present case, regulations governing the certification process were not published until June 25, 1980, almost six months after the final decision by the contracting officer hereinbelow. However, petitioner contends that in the pr[illegible] case the agency did exercise its authority to determine the form, nature, manner and timing of certification through the contracting officer. The extensive communication between the petitioner and contracting officer, including the tentative decision of July 25, 1979 (App. Exh. D), extensive suppiemental memoranda and economic evaluations, the advice from the contracting officer that "considerable time and effort" was being devoted to the task of evaluating petitioner's submissions (App. Exh. I), and the formal nature of the final decision itself, leaves no doubt that the DLA, as the agency in authority, was closely directing the conduct of the contracting officer, Meta Lund, in the present case. As pointed out above, the Procurement Commission's report highlighted as Recommendation No. 1 the requirement that the agency advise and thoroughly inform the contractor of the role and authority that the contracting officer plays

in the decision-making process in each particular case. From the record it is clear in the present case that the petitioner and the DLA engaged in a long and detailed series of informational exchanges through the contracting officer on this claim, with the DLA inviting further specific information from time to time. In the present case, it is the history of the DLA's exercise of its authority and responsibility to "make clear [the contracting officer's] role to the contractor" (Sen. Rpt. p.22) that underscores the importance of petitioner's letter to the contracting officer dated November 29, 1979 (App. Exh. H) in which petitioner again expressed the desire to provide "any further information or documentation in any particular area of our proposal" such as might be desired by the DLA in order to "facilitate the proper and full consideration of this matter at the administrative level." At no time in its subsequent communications to the petitioner did the agency through the contracting officer indicate the need for further data to sufficiently certify that the subject claim had been made in good faith, that the supporting data were accurate and complete to the best knowledge and belief of the petitioner or that the amount requested accurately reflected the contract adjustment claimed.

Further evidence that the DLA was satisfied that the claim had been adequately certified is represented by the fifteen-page final decision entered on February 6, 1980 (App. Exh. K), which advises the contractor on page 15 thereof:

> In lieu of appealing to the Armed Services Board of Contract Appeals you may, under said Act, bring an action directly in the United States Court of Claims within twelve (12) months from the date you receive this decision. Such action must be filed in accordance with the rule of that court.

On page 4 of its order hereinbelow, the Court of Claims held: "(1) that the Act does not grant us jurisdiction over plaintiff's uncertified claim and (2) that plaintiff's estoppel argument must also be rejected. Contracting officers are not empowered to 'waive a requirement that Congress imposed.' *(Lehman v. U.S.,)* at 6." To the contrary, the petitioner respectfully suggests that the contracting officer, through close direction in this case by the Defense Logistics Agency, was *following* a requirement that Congress imposed by closely advising and directing the contractor regarding the information needed in order to practically achieve the submission of a certified claim over $50,000. In order that the purpose of the Act and the intent of Congress can be

achieved as discussed above, the forms, timing, manner and nature of certification of a claim over $50,000 must rest in the discretion of the agency involved as a matter of the claim application process and not as a matter of jurisdiction.

II

EVEN IF CERTIFICATION OF A CLAIM IS A PREREQUISITE TO JURISDICTION IN THE COURT OF CLAIMS, THE DLA THROUGH THE CONTRACTING OFFICER PROPERLY EXERCISED ITS DISCRETION IN TREATING AND CONSIDERING THE SUBJECT CLAIM AS ADEQUATELY CERTIFIED.

Based on the above discussion of Congress' intent in promulgating the Act, petitioner suggests that, even if certification is a jurisdictional prerequisite to decision in a claim over $50,000, determination of the adequacy of such certification, the manner in which such certification is made and other such procedural aspects of certification are vested in the contracting officer as directed by the agency. The expanded authority of the contracting officer under the Act empowers that officer to consider and decide all claims by a contractor against the government (41 U.S.C. § 605(a)) and makes his decision on such claims final and conclusive and not subject to review by any forum, tribunal or government agency, except by appeal (41 U.S.C. § 605(b)). Until such time as appropriate regulations establish the procedures by which a contractor certifies a claim over $50,000, the adequacy of a contractor's claim relevance to the elements of certification should be subject to the discretion of the contracting officer in concert with the procuring agency.

In its opinion below, the Court of Claims rejects petitioner's assertion that the statute leaves the determination of the adequacy of the certification to the contracting officer's discretion (App. Exh. B, p. 3). As its sole basis for rejecting this interpretation, the court cites "the significant role certification plays in the statutory scheme" (App. Exh. B, p. 3). However, as above noted, the number one recommendation of the Procurement Commission's report is that the operation of this Act result in "a thorough knowledge by the contractor of the role and authority that the contracting officer plays in the decision-making process of the agency he represents" (Sen. Rpt. p 21). In the discussion of key issues from the Senate report hereinabove, it is clear that Congress intended that the procuring agencies should have the authority and flexibility in deciding the role of the contracting officer in order to meet this

number one goal of advising the contractor in each specific case. The Defense Logistics Agency throughout the present case carefully and extensively guided the contracting officer and equally specifically and extensively advised the contractor, accordingly. In sum, the agency had the authority and, to determine the standards of certification under the Act, in exercising its discretion through the contracting officer, determined that the submitted claim of petitioner was adequately certified. The lack of standards, forms and regulations with regard to the procedural aspects of certification creates a reasonable presumption that the determination of the adequacy of certification is vested in the discretion of the contracting officer, which presumption is supported by the further presumption of regularity of administrative action unless there is evidence of an arbitrary, capricious abuse of such discretion. See, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926); *Ross v. Stewart*, 227 U.S. 530, 535 (1913).

Clearly, in order to meet the primary objectives of the Act as found by Congress, the adequacy of certification should be left to the contracting officer's discretion in each individual case, subject to regulations and procedures established by the agency from time to time.

III

EVEN IF CERTIFICATION IS JURISDICTIONAL AND THE CONTRACTING OFFICER ERRED IN TREATING THE CLAIM AS CERTIFIED, RESPONDENT IS ESTOPPED FROM CLAIMING THAT ADEQUATE CERTIFICATION IS LACKING.

Although the contracting officer, Meta Lund, signed the correspondence and decisions, it is clear that she was not the primary decision-maker in this matter. The DLA, its attorneys and other experts played the leading roles. This is not a case, as suggested by the court below at page 4 in its order (App. Exh. B), wherein a contracting officer has attempted to "waive a requirement that Congress imposed." Rather, the DLA, as the procuring agency involved, and, hence respondent, should be estopped from raising the issue of adequacy of certification because (1) it failed to carry out the most important duty of making clear to the petitioner what role and authority the contracting officer had in adjudging the adequacy of certification, and (2) it failed to advise the petitioner of the form and manner in which such certifica-

tion must be made. The court below held that certification of the supporting data must be made by the petitioner and not on its behalf by the expert economist involved, and that the certification must be in a statement which simultaneously makes all assertions required under the statute. Such forms and procedures are not expressly required by the statute and were not communicated to the petitioner by the DLA. To the contrary, the DLA led the petitioner to believe that its claim was fully submitted and adequately certified for decision by the contracting officer as a certified claim over $50,000. The DLA's conduct in this respect constitutes insufficient notice to petitioner of new procedures and standards under the Act. See, *Hatch v. FERC*, 654 F.2d 825 (1981). For the above reasons, respondent should be estopped from raising the issue of adequacy of certification in this matter.

The doctrine of equitable estoppel will generally not be invoked against the government in its sovereign capacity unless such conduct can properly be called "affirmative misconduct." See, *Simon v. Califano*, 593 F.2d 121 (Ca. 9 Cal.). Estoppel is available as a defense against the government if the government's wrongful conduct threatens to work serious injustice and if the public interest would not be unduly damaged by imposition of estoppel. *U.S. v. California*, 403 F.Supp. 874 (Ed. Cal.), aff'd. 550 P.2d 1239 (Ca. 9 Cal.), op. withdrawn by order of court, op. replaced 558 F.2d 1347 (Ca. 9 Cal.), rev'd on other grounds 438 U.S. 645, 57 L.Ed. 1018, 98 S.Ct. 2985.

IV

PETITIONER'S FORMAL CERTIFICATION OF CLAIM FILED AFTER THE FINAL DECISION OF THE CONTRACTING OFFICER BUT BEFORE RUNNING OF THE TIME FOR APPEAL TO THE COURT OF CLAIMS CURES ANY LACK OF JURISDICTION IN THE COURT OF CLAIMS ARISING FROM INADEQUATE CERTIFICATION ON THIS CLAIM UNDER 41 U.S.C. § 605(c)(1).

Should certification of the nature described by the court below be deemed a jurisdictional prerequisite to petitioner's submitting a claim, the filing by petitioner of a formal certification of claim on December 31, 1980 (App. Exh. L), should be allowed, in equity, to cure *nunc pro tunc* any such jurisdictional defect under 41 U.S.C. § 605(c)(1) and render the contracting officer's decision hereinbelow fully certified.

Such *nunc pro tunc* certification would render petitioner's second petition to the Court of Claims dated February 3, 1982, timely.

At page 3 of its opinion hereinbelow, the Court of Claims claims that *Lehman v. U.S., supra*, implicitly rejects such equitable relief and refers to language in *Lehman* laying blame on the plaintiff therein for failing to certify its claim as the Act requires. Petitioner suggests that this is not a matter of blame but a matter in which equitable relief could be granted with no injury resulting to the government or the Court of Claims. As pointed out above, the DLA, the contracting officer and petitioner all obviously believed that petitioner's claim was sufficiently certified under the Act and petitioner properly relied on the agency's direction in this regard. It is clear that the type of certification envisioned by the Court of Claims would add nothing to the evidence and supporting data presented by petitioner upon which the final decision was rendered in this matter. The extensive memoranda, economic studies and other supporting data would not be altered by petitioner's recitation of the assertions required by 41 U.S.C § 605(c)(1). Such *nunc pro tunc* certification would also be favored by the purposes of the Act in that it would promote the concept of communication between the agency and the contractor and avoid nitpicking procedural pitfalls.

Furthermore, unlike the plaintiff in *Lehman*, petitioner does not have the option of a trial *de novo* before the Board of Contract Appeals, for the reason that the ninety-day period for appeal to the Board under 41 U.S.C. § 606 ran prior to the filing of the petition herein before the Court of Claims.

The reasonable remedy afforded by allowing *nunc pro tunc* certification, the lack of other remedies, and the lack of harm to the government, support allowance of this proposed equitable relief. Frequently the courts have allowed petitioners to supplement the record after a decision in order to meet newly imposed standards. *Hatch v. FERC, supra.*

V

THE JUDGMENT AND OPINION BELOW RESULTS IN CREATING A PROCEDURE WHICH DEFEATS THE PURPOSE OF THE CONTRACT DISPUTES ACT BY DENYING THE AVAILABILITY OF APPEAL FROM DECISIONS OF CONTRACTING OFFICERS TO THE COURT OF CLAIMS.

As reviewed in the statement of facts above, petitioner has requested a new "final opinion" from the contracting officer on the grounds that the decision of the Court of Claims rendered the contracting officer's decision an uncertified decision. Claims for sums over $50,000 must be submitted as certified claims according to the language of 41 U.S.C. § 605(c)(2). Hence, in accordance with the decision of the Court of Claims rejecting the curing effect of the post-decision filing of a formal certification by petitioner, it must logically follow that no certified claim was ever submitted to the contracting officer in the present case and no decision rendered. However, the DLA has responded through a letter dated May 14, 1982, by the contracting officer (App. Exh. O), that "a valid final decision in this matter was issued to the W. H. Moseley Company on 6 February, 1980, under the disputes clause of the contract," and strongly implies that no further decision will be forthcoming. Therefore, by ignoring the requirement in Section 605(c)(2) that a decision may only be issued on certified claims over $50,000 on one hand, and requiring that such claims be certified on the other hand, appeals to the Court of Claims under Section 609 can be effectively done away with by contracting officer's simply rendering decisions on claims prior to final certification. The Court of Claims noted at page 3 of its decision hereinbelow (App. Exh. B), "there is some question as to when plaintiff's claim to the contracting officer was finalized . . . ". Petitioner contends in the alternative that its claim was not fully submitted until certified in accordance with the standards set down by the Court of Appeals.

CONCLUSION

The purpose and history of the Act weigh strongly against making certification of a claim over $50,000 a jurisdictional prerequisite to rendering a decision on a claim under 41 U.S.C. § 605(c) and for bringing a *de novo* action in the Court of Claims under 41 U.S.C. § 609.

Even if certification be held to be a prerequisite to jurisdiction, petitioner should nevertheless be granted equitable relief. The DLA, as procuring agency, worked closely with and guided the contracting officer in the informational exchange and development of supporting data on submission of the subject claim by petitioner. Petitioner repeatedly inquired whether more information was needed regarding the very elements that form the factual bases of the assertions required by 41 U.S.C § 605(c)(1). Petitioner complied with all requests and invitations for more information and supporting data and further inquired of the DLA whether any further information or data was needed in order to fully submit the claim. A decision was rendered and as part of that decision petitioner was advised that it had an appeal to the Court of Claims. No regulations, guidelines or standards regarding the matter of certification had been promulgated by the agency at this time and it is clear that all parties believed the claim was properly certified and submitted. Under these circumstances and in light of the primary purposes of the Act, petitioner is entitled to equitable relief and its claim below deemed adequately certified.

The order and opinion of the court below are manifestly contrary to the purpose and intent of the Act in that they create a useless jurisdictional pitfall and tend to complicate procedures the Act attempted to streamline. Further, they interfere with the objective of the Act to place discretion and authority in the contracting officer to decide claims in conjunction with the procuring agency. Finally, the decision and opinion below deny equity to petitioner under circumstances which, if granted, would not change the evidence relied upon by the contracting officer in rendering her decision and would create no burden or hardship upon the government.

Petitioner strongly urges reversal of the opinion below.

DATED: June 18, 1982.

JOHN L. RUNFT, Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the within and foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS was made this 18th day of June, 1982, by mailing three copies of the same to:

Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN L. RUNFT

EXHIBIT A

In the United States Court of Claims

No. 56-81

W. H. MOSELEY COMPANY, INC.

v.

THE UNITED STATES

Government contract; Contract Disputes Act; certification of claim

---

John L. Runft, attorney of record, for plaintiff. *Runft, Stecher & Coffin, Ctd.*, of counsel.

Sara V. Greenberg, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant.

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ORDER

This Government contract case raises the questions whether plaintiff certified its claim as required by section 6(c) (1) of the Contract Disputes Act of 1978 (act), 41 U.S.C. § 605 (c)(1) (Supp. III 1979), and, if not, whether plaintiff can gain direct access to this court. Plaintiff argues (1) that certification is not a jurisdictional prerequisite to our rendering a decision; (2) that since the contracting officer processed the claim and rendered a final decision, defendant

should be estopped from claiming that the proper certification is lacking; and (3) that, taken as a whole, statements in different communications from plaintiff and its associates to the contracting officer comply with the certification requirement. We resolve all issues in favor of defendant.

Because of the importance that plaintiff attaches to language in several documents plaintiff submitted to the contracting officer for support of its argument that, as a whole, the documents amount to a certification, we now reprint the language cited and plaintiff's brief's attendant commentary:

> Plaintiff submits that considered together as a whole, the documents and letters submitted on its claim for award by plaintiff comply with the requirements of and constitute certification under 41 U.S.C. Section 605(c)(1). Plaintiff's formal memorandum in support of its claim submitted on June 15, 1979, states in its "Introduction":
>
> > This memorandum is hereby submitted to the Defense Logistics Agency by the W.H. Moseley Company of Boise, Idaho, for the purpose of providing facts, analysis and argument in support of its claim for an award based on costs savings realized by the government resulting from implementation of the value engineering change proposal (VECP) . . . .
>
> On page 23 of said memorandum, plaintiff concludes its presentation regarding computation of costs savings and award with the following statements of good faith and belief as to the accuracy and completeness of the data and the contract adjustment for which plaintiff claims an award is due:
>
> > After a careful study of Dr. Mitchell's evaluation, we believe that the evidence most strongly supports a determination of savings based upon the rejected Moseley bids — the sum of $2,321,400.00. Another reasonable approach might be to take the arithmetic mean of his four methods of evaluation, or the sum of $1,865,600.00, which is a compromise recognizing the difficulty of precise evaluation.
>
> The economic evaluation in support of said memorandum prepared by Dr. John W. Mitchell, an economist, concludes with these words regarding his belief that the amount requested accurately reflects the amount for which the government is liable:

> In this situation, the basic theory, the timing of events, actual rejection of low bids, the contrasts with other years, and the opinions of those in the industry would support the proposition that a savings resulted from the implementation of the Moseley Company suggestion. An average of the approaches would support a savings of about $1.87 million.

Similar statements of belief regarding the accuracy and completeness of the material presented were made by plaintiff in its supplementary memorandum and economic analysis filed with the DLA by plaintiff under cover letter dated September 22, 1979.

The first two of plaintiff's contentions were addressed and rejected in our recent opinion, *Paul E. Lehman, Inc.* v. *United States*, Ct. Cl. No. 270-81C (slip opinion of February 24, 1982). Therefore, those contentions must be and are rejected here.

The facts relating to the merits of plaintiff's claim have no bearing on the disposition of the case; therefore, let it suffice to say that plaintiff suggested certain changes in the performance requirements of a contract it had with the Defense Logistics Agency. Plaintiff claims that these changes entitle it to a monetary award based on the savings defendant realized from implementing the suggestions. While there is some question as to when plaintiff's claim to the contracting officer was finalized, both parties agree it was well after the effective date of the act. Furthermore, there is no issue as to whether, if certification is not a barrier to plaintiff's claim, the claim meets the other prerequisites of the act.

In *Lehman*, we gave a detailed analysis of assertions identical to plaintiff's initial two contentions. We first considered the requirements of section 605(c)(1), which states that:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

After reviewing the act's legislative history and the mechanics of the statute, we concluded that "[t]he import of the language of the Act and its legislative history is that unless a claim has been properly certified it cannot be considered under the statute. * * * Unless that

requirement is met, there is simply no claim that this court may review under the Act." *Paul E. Lehman, Inc.* v. *United States, supra* at 5.

We have carefully considered the record and the submissions of both parties and, in light of our rulings in *Lehman*, hold (1) that the act does not grant us jurisdiction over plaintiff's uncertified claim and (2) that plaintiff's estoppel argument must also be rejected. Contracting officers are not empowered to "waive a requirement that Congress imposed." *Id.* at 6. Also, (3) we conclude that, for reasons which we shall state in a forthcoming opinion, neither plaintiff's piecemeal submissions to the contracting officer nor its untimely subsequent submission of a "certification" constitute certification pursuant to the requirements of section 6(c)(1) of the act.

IT IS THEREFORE ORDERED, without hearing oral argument, since no genuine issues of material facts are present, that defendant's motion for summary judgment is granted on the pleadings and briefs. The petition is dismissed.

BY THE COURT

Edward S. Smith
Judge

EXHIBIT B

In the United States Court of Claims

No. 56-81

(Decided April 21, 1982)

W. H. MOSELEY COMPANY, INC.
v. THE UNITED STATES

John L. Runft, attorney of record, for plaintiff. *Runft, Stecher & Coffin, Ctd.*, of counsel.

Sara V. Greenberg, with whom was *Assistant Attorney General J. Paul McGrath*, for defendant.

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SMITH, *Judge*, delivered the opinion of the court:

On March 23, 1982, we issued an order in this contract case, granting defendant's motion for summary judgment and dismissing the petition, in which order we stated that this opinion would follow. In that order we ruled, on the basis of our opinion in *Paul E. Lehman, Inc.* v. *United States*,[1] that (1) certification of a claim pursuant to section 6(c)(1)of the Contract Disputes Act of 1978 (act)[2] is a jurisdictional prerequisite to a direct challenge in this court of a contract-

[1] *Paul E. Lehman, Inc.* v. *United States*, Ct. Cl. No. 270-81C (slip op. of Feb. 24, 1982).

[2] 41 U.S.C. § 605(c)(1)(Supp. III 1979).

ing officer's decision, and that (2) the Government may not be estopped, by an asserted "waiver" by the contracting officer, of that statutory requirement, to claim that the proper certification is lacking.

Plaintiff's third contention, that it had in effect complied with the statutory certification requirements, was rejected in our order of March 23, 1982, with a statement that our rationale for that conclusion would be given in this opinion.

The facts necessary to our decision are as follows: plaintiff suggested certain changes in the performance requirements of a contract of January 31, 1978, it had with the Defense Logistics Agency and claimed that these changes entitle it to a monetary award based on the savings defendant realized from implementing the suggestions. Both parties agree that plaintiff's claim to the contracting officer was finalized well after the effective date of the act. There is no issue as to whether, if certification is not a barrier to plaintiff's claim, the claim meets the other prerequisites of the act.

Plaintiff argues that documents and letters submitted on its claim for the award, originally on June 15, 1979, and, in subsequent correspondence, including a supplementary memorandum and economic analysis, submitted on September 22, 1979, taken as a whole, amount to a certification. In its original memorandum in support of its claim, plaintiff adverted to the economic evaluation attached thereto prepared by Dr. Mitchell, an economist, as follows:

> The economic evaluation in support of said memorandum prepared by Dr. John W. Mitchell, an economist, concludes with these words regarding his belief that the amount requested accurately reflects the amount for which the government is liable:
>
> > In this situation, the basic theory, the timing of events, actual rejection of low bids, the contrasts with other years, and the opinions of those in the industry would support the proposition that a savings resulted from the implementation of the Moseley Company suggestion. An average of the approaches would support a savings of about $1.87 million.

Section 605(c)(1) states that:

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and

that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

To begin with, in light of our holdings above, and in *Lehman*, we must reject plaintiff's assertion that the statute leaves the determination of the adequacy of the certification to the contracting officer's discretion.

Certification requires that the contractor certify that (a) the claim is made in good faith, (b) the supporting data are accurate and complete to the best of his knowledge and belief, and (c) the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. Because of the significant role certification plays in the statutory scheme, we hold that to properly certify a claim a contractor must make a statement which simultaneously makes all of the assertions required by 41 U.S.C. § 605(c)(1).

Furthermore, the language to which plaintiff adverts in the supporting documents and correspondence, even if it were not presented in a piecemeal fashion, would not meet these specific requirements. Most significantly, the fact that the language, which is supposed to indicate plaintiff's belief that the amount requested accurately reflects the contract adjustment, is written by Dr. Mitchell and not by *the contractor* invalidates any claim to a proper certification.

Finally, plaintiff argues that now that it has gone back to the contracting officer and certified the pertinent claim, it should be able to gain direct access to the court. However, *Lehman* implicitly rejects that argument. The court in *Lehman* directed the plaintiff to a relevant board of contract appeals, with the right to subsequent judicial review in this court. And, as *Lehman* concluded, plaintiff cannot be heard to complain about this result since "[a]lthough the plaintiff's trial *de novo* will be before the board rather than before this court, that is the consequence of the plaintiff's own default in failing to certify its claim, as the Act requires."[3]

Since plaintiff failed to certify its claim as required by section 6(c)(1) of the Contract Disputes Act of 1978, we are without jurisdiction to consider its direct appeal to this court. For this, and the other reasons set out above and in our order of March 23, 1982, and with-

[3] *Paul E. Lehman, Inc.* v. *United States, supra* note 1, slip op. at 7.

out hearing oral argument, we have granted defendant's motion for summary judgment and have dismissed the petition.

☆ U.S. Government Printing Office: 361-518/1005

EXHIBIT C

RUNFT & LONGETEIG, CHARTERED
ATTORNEYS & COUNSELORS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 953
BOISE, IDAHO 83701
(208) 345-6521

JOHN L. RUNFT
IVER J. LONGETEIG
DAVID J. STECHER
TERRY E. COFFIN

WAYNE L. KIDWELL
OF COUNSEL

June 15, 1979

Ms. Meta Lund, Contracting Officer
Defense Logistics Agency
Defense Subsistence Region Pacific
2155 Mariner Square Loop
Alameda, California 94501

Re: Value Engineering Change Proposal (VECP)
DPSC-S-VECP 18-78, W. H. Moseley Co., Boise, Idaho,
DLA 137-78-C-CH32, Broaden Color Requirements, Frozen
French Fried Potatoes

Dear Ms. Lund:

Please find enclosed for and as service upon you as Contracting Officer for the Defense Logistics Agency the final documentation required by paragraph J17 (b) on behalf of the W. H. Moseley Company VECP (DPSC-S-VECP 18-78). The enclosed documentation consists of a Memorandum in Support of Claim of Cost Savings Realized (with seven exhibits attached) and an Evaluation of Value Engineering Change Proposal prepared by economist John W. Mitchell, Ph.D.

Your cooperation and the cooperation of your department has been much appreciated throughout our efforts in gathering and preparing this material for presentation.

Very truly yours,

JOHN L. RUNFT

JLR:nh
Enclosures

cc: W. H. Moseley Company

EXHIBIT D

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/PF (M. Lund/869-4566/mj) 25 July 1982

SUBJECT: Value Engineering Change Proposal (VECP) DPSC-S-VECP-18-78, W. H. Moseley Company, Boise, Idaho, DLA137-78-C-CH32, Broaden Color Requirements, Frozen French Fried Potatoes.

Runft & Longeteig, Chartered
Attorneys & Counselors at Law
420 West Bannock Street
Boise, Idaho 83701

Dear Mr. Runft,

Reference is made to your letter of 15 June 1979, on Subject (VECP) DPSC-S-VECP-18-78 and enclosures MEMORANDUM IN SUPPORT OF CLAIM OF COST SAVINGS REALIZED and EVALUATION OF VALUE ENGINEERING CHANGE PROPOSAL as submitted on behalf of W. H. Moseley Company.

The undersigned does not dispute that:

a. W. H. Moseley and Company submitted the VECP.

b. The government implemented a change to the color requirements for french fried potatoes.

c. The contractor was notified that the VECP was accepted.

The undersigned requested the contractor to provide data to establish if production savings were realized when the color range was changed and the contractor stated that there was no savings in the cost of production.

After reviewing the MEMORANDUM IN SUPPORT OF CLAIMS OF COST SAVINGS REALIZED and attached EVALUATION OF VALUE ENGINEERING CHANGE PROPOSAL, the undersigned cannot approve any payment at this time because:

a. Although the information presents the economist's conclusion that a change in color would affect the price, it is still necessary to determine to what extent the color change *alone* affected prices.

b. Although not conclusive, it would be relevant to determine how the prices paid by DPSC before and after the color change compared to prices paid by large volume buyers whose color requirements *did not change* during the comparison period.

c. Without such a comparison the government is unable to determine to what extent price reductions are attributable to color changes as opposed to other variables.

Until data is provided which will establish how much of the price reduction was directly caused by the color change, the government cannot determine the three year savings.

It is requested that either you or your client provide the comparison data as explained in subparagraph (b) above, as well as any other quantitative data which would show the extent of the price change caused entirely by the change in the color requirements. The contractor is responsible for submitting sufficient and complete data to evaluate their VECP per clause J 17, Value Engineering Incentive (DPSC 1976 Oct.), paragraph (b) Documentation of the Additional General Provisions (DPSC Form 3020).

Meta Lund,
Contracting Officer

EXHIBIT E

RUNFT & LONGETEIG, CHARTERED
ATTORNEYS & COUNSELERS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 953
BOISE, IDAHO 83701
(208) 345-6521

JOHN L. RUNFT
IVER J. LONGETEIG
DAVID J. STECHER
TERRY E. COFFIN

WAYNE L. KIDWELL
OF COUNSEL

July 30, 1979

Ms. Meta Lund, Contracting Officer
Defense Logistics Agency
Defense Subsistence Region Pacific
2155 Mariner Square Loop
Alameda, California 94501

Re: Value Engineering Change Proposal (VECP)
DPSC-S-VECP 18-78, W. H. Moseley Co., Boise, Idaho,
DLA 137-78-C-CH32, Broaden Color Requirements, Frozen French Fried Potatoes

Dear Ms. Lund:

This acknowledges receipt of your letter dated July 25, 1979, in response to the MEMORANDUM IN SUPPORT OF CLAIM OF COSTS SAVINGS REALIZED and EVALUATION OF VALUE ENGINEERING CHANGE PROPOSAL as submitted on behalf of the W. H. Moseley Company and enclosed in my letter to you dated June 15, 1979. Let me take this opportunity on behalf of my clients to thank you and the Agency for the thoughtful reply and the suggestions contained therein.

As we discussed by telephone today, the suggestions set forth in your letter dated July 25, 1979, regarding the gathering and develop-

ment of more comparative information would preclude your letter from constituting a final response to the application by the W. H. Moseley Company for an award based upon its VECP — if the W. H. Moseley Company intends to pursue the suggestion contained in your letter and go forward with the development of the requested information. This confirms that the W. H. Moseley Company, through this law office, does intend to pursue the suggestions and to comply with the request to provide comparison data specified as well as any other quantitative data which would show the extent of the price change caused entirely by the change in color requirements.

Pursuant to our conversation, this confirms our understanding that no appeal time has commenced to run and that we will make every effort to gather, develop and file with your office the requested comparison data by October 1, 1979.

Thank you for your usual courtesies.

Very truly yours,

JOHN L. RUNFT

JLR:kd

cc: W. H. Moseley Company

EXHIBIT F

RUNFT & LONGETEIG, CHARTERED
ATTORNEYS & COUNSELORS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 953
BOISE, IDAHO 83701
(208) 345-6521

JOHN L. RUNFT
IVER J. LONGETEIG
DAVID J. STECHER
TERRY E. COFFIN

WAYNE L. KIDWELL
OF COUNSEL

September 22, 1979

Ms. Meta Lund, Contracting Officer
Defense Logistics Agency
Defense Subsistence Region Pacific
2155 Mariner Square Loop
Alameda, California 94501

Re: Value Engineering Change Proposal (VECP)
DPSC-S-VECP 18-78, W. H. Moseley Co., Boise, Idaho,
DLA 137-78-C-CH32, Broaden Color Requirements, Frozen French Fried Potatoes

Dear Ms. Lund:

Pursuant to my letter to you of July 30, 1979, and in response to your letter dated July 25, 1979, please find enclosed for and as service upon you as Contracting Officer for the Defense Logistics Agency, the supplemental documentation submitted pursuant to Paragraph J17(b) relative to the W. H. Moseley Company VECP (DPSC-S-VECP 18-78). The enclosed documentation consists of Supplementary Memorandum in Support of Claim of Cost Savings Realized, with Exhibits "A" and "B" attached. Exhibit "B" consists of a Supplemental Economic Evaluation of the Value Engineering Change Proposal prepared by economist John W. Mitchell, Ph.D.

The suggestions and data requests relative to further comparison data made by your office were most helpful to us in our effort for submitting the supporting data necessary for DLA evaluation of the Moseley VECP. Your cooperation in this regard is most appreciated.

Very truly yours,

JOHN L. RUNFT

JLR:nh
Enclosures
cc: W. H. Moseley Company

EXHIBIT G

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/PF
(Meta Lund/(415)869-4566/shb) 29 October 1979

SUBJECT: Value Engineering Change Proposal (VECP) DPSC-S-VECP 18-78, W. H. Moseley Co., Boise, Idaho, DLA137-78-C-CH32, Broaden Color Requirements, Frozen French Fried Potatoes

Runft and Longeteig, Chartered
Attorneys and Counsel at Law
420 West Bannock Street
Post Office Box 953
Boise, Idaho, 83701

Dear Mr. Runft:

Thank you for your letter of 22 Sep 79 enclosing further documentation on Subject as above. The Supplementary Memorandum in Support of Claim of Cost Savings Realized and exhibit A and B are being reviewed and evaluated by various offices. We are checking with the various offices involved to determine an estimated date when our evaluation will be completed. Mr. Masner requested such on estimated date by telephone on 25 October 1979. I am sure we all appreciate the research involved and statistical data required to properly evaluate your VECP.

A date when the government estimates that we will complete the evaluation of your VECP will be provided as soon as possible.

Sincerely,

META LUND
Contracting Officer

EXHIBIT H

RUNFT & LONGETEIG, CHARTERED
ATTORNEYS & COUNSELORS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 953
BOISE, IDAHO 83701
(208) 345-6521

JOHN L. RUNFT
IVER J. LONGETEIG
DAVID J. STECHER
TERRY E. COFFIN
JOHN F. ADLARD

WAYNE L. KIDWELL
OF COUNSEL

November 29, 1979

Ms. Meta Lund, Contracting Officer
Defense Logistics Agency
Defense Subsistence Region Pacific
2155 Mariner Square Loop
Alameda, California 94501

Re: Value Engineering Change Proposal (VECP)
DPSC-S-VECP 18-78, W. H. Moseley Co., Boise, Idaho,
DLA 137-78-C-CH32, Broaden Color Requirements, Frozen
French Fried Potatoes

Dear Ms. Lund:

I am in receipt of your letter dated October 29, 1979, for which I thank you. Since another month has passed, this matter has regularly come up on my calendar and I thought I might inquire as to whether there had yet been a determination as to an estimated date for completion of the evaluation, as mentioned in your last letter. Let me hasten to say I am mindful of the fact these matters of evaluation are time-consuming, but I did want to obtain the time estimate for completion of the evaluation at your earliest convenience.

As you may have noted in the supplementary memorandum and other documents enclosed with my letter of September 22, 1979,

there is virtual unanimity in the industry regarding our analysis and interpretation of the magnitude of the effect the color change alone had on french fried potato prices in the instant case. I mention this for the reason that, should there be a need for any further information or documentation in any particular area of our proposal, I am confident that we could readily provide any such specified information. It is our desire to do all we can to facilitate the proper and full consideration of this matter at the administrative level.

Sincerely yours,

JOHN L. RUNFT

JLR:nh
cc: W. H. Moseley Company

EXHIBIT I

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/PF
(Meta Lund/(415) 869-4566/mja) 1 December 1979

SUBJECT: Value Engineering Change Proposal (VECP)
DPSC-S-VECP-18-78,
W. H. Moseley Company, Boise, Idaho
DLA137-78-C-CH32, Broaden Color
Requirements, Frozen French Fried Potatoes

Runft and Longeteig, Chartered
Attorneys and Counsel at Law
420 West Bannock Street
Post Office Box 953
Boise, Idaho 83701

Dear Mr. Runft:

Reference my letter of 29 October 1979, the government is still evaluating the subject VECP. Information and statistical data is being obtained, reviewed and evaluated by this office, USDA and DPSC Headquarters, Philadelphia. considerable time and effort is being devoted to this task, but we need more time to complete our work.

The government should complete the evaluation and have a final decision in two more months. Your indulgence in this matter is requested.

Sincerely,

META LUND
Contracting Officer

EXHIBIT J

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/PF
(Meta Lund/(415) 869-4566/mja) 30 January 1980

SUBJECT: Value Engineering Change Proposal (VECP) DPSC-S-VECP 18-78, W. H. Moseley Company, Boise, Idaho DLA137-78-C-CH32, Broaden Color Requirements, Frozen French Fried Potatoes

Runft and Longeteig, Chartered
Attorneys and Counsel at Law
420 West Bannock Street
Post Office Box 953
Boise, Idaho 83701

Dear Mr. Runft:

Reference our letters of, 29 October 1979 and 1 December 1979, evaluation and a final decision based on information and statistical data obtained will not be completed by this office until 8 February 1980.

Request your indulgence in this matter.

Sincerely,

META LUND
Contracting Officer

EXHIBIT K

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/P

6 January 1980

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Runft and Longeteig, Chartered
Attorneys and Counsel at Law
420 West Bannock Street
Boise, Idaho 83701

SUBJECT: Notice of Contracting Officer's Decision — VECP 18-78 under Contract DLA 137-78-CH32

Gentlemen:

Your request by letter(s) dated 5 April 1978, 14 April 1978, 17 April 1978, 12 May 1978, 20 June 1978, 29 June 1978, 28 August 1978, 15 June 1979 and 22 September 1979 addressed to the Contracting Officer of the subject contract requesting a Value Engineering award of $1,160,700.00 under the subject contract based on savings to the Government in the amount of $2,321,400.00 pursuant to Article J-17 of the DPSC Master Solicitation DPSC Form 3962 SEP 77, entitled Value Engineering Incentive (DPSC 1976 OCT) by reason of savings believed achieved by the Government under VE submission DPSC-S-VECP-18-78, has been reviewed analyzed in detail by the undersigned Contracting Officer.

As a result of this review and analysis, the FINDING OF FACTS AND DETERMINATION OF THE CONTRACTING OFFICER set forth herein have been made on your referenced request for a VE award. Notice is hereby given to you that on the basis of said FINDING OF FACT AND DETERMINATION OF THE CONTRACT-

ING OFFICER, it is the decision of the undersigned that your request for a VE award cannot be granted.

I. FINDING OF FACTS

A. Regarding the occurrences and events leading up to the referenced claim for a VE award, I hereby find as follows:

1. That Request for Proposals No. DLA-13-H-78-R1115 was issued on 19 January 1978 by the Defense Personnel Support Center (hereinafter referred to as DPSC) with the closing date for receipt of proposals on 31 January 1978.

2. The referenced RFP in pertinent part called for:

a. Lot 12 — 68,000 lbs. of White Frozen French-Fried Potatoes in 2- to 6-lb. bag or box, crinklecut or straight-cut strips, U.S. Grade A 8915-00-782-3508 TPK-1.

b. Lot 16 — 48,000 lbs. of White Frozen French-Fried Potatoes as described for Lot 12 above.

c. Lot 12 — specified delivery to Watertown, Mass. on 28 February 1978 and Lot 16 specified delivery to El Paso, Texas, on 6 March 1978.

d. Under Section F of Master Solicitation both Lots 12 and 16 required color No. 0 or No. 1 as called for in U.S. Standards for Grades of Frozen French-Fried Potatoes dated 8 February 1967.

3. A contract No. DLA 137-78-C-CH32 was awarded to W. H. Moseley on 31 January 1978 at a unit price of .1995 per lb. for Lot 12 and at a unit price of .2038 per lb. for Lot 16: The contracts were awarded competitively based on the lowest responsive offer received.

4. By letters dated 22 February 1978 and 2 March 1978, W. H. Moseley submitted a Value Engineering Incentive Proposal under subject Contract No. DLA 137-78-C-CH32. Under this VE proposal W. H. Moseley suggested changing the color standards to read: "Color 00 to 1 in the frozen par fry state and .5 to 1.5 after refrying for two minutes and thirty seconds at 350F - 360F, U.S. Standards for Grades of Frozen French-Fried Potatoes" in lieu of "Color 0 or No. 1 U.S. Standards of Grades of Frozen French-Fried Potatoes, 8 February 1967, (V/E 106,000,000 lbs.) The V.E. proposal estimated savings on the assumption that if the color restrictions were lowered, more processors would bid in solicitations and lower the award price from .01 to

.005 per lb. overall. A Table of Savings was included indicating the range of savings from .01¢ per lb. to .0001¢ per lb. The V.E. proposal did not anticipate any collateral costs to the Government by virtue of the implementation of this V.E. Proposal.

5. Delivery under the subject contract was made on 2 March 1978 under Lot 12 and completed on 12 March 1978 under Lot 16, or, prior to the contractor being notified by the Contracting Officer that the VE proposal was approved. Final payment under the contract was made on 24 March 1978. The potatoes delivered under the contract were in the 00-0 color range although the subject contract was never modified to reflect the VE change in color standards.

6. The referenced VE proposal was concurred in by the Armed Forces Products Evaluation Committee (AFPEC) during a meeting on 8-9 March. The Contracting Officer was advised of this by letter dated 14 March 1978 from the Chief, Technical and Quality Assurance Division at DPSC and also that the change proposed by the referenced VECP would be incorporated in the Federal Supply Catalog C8900-SL FSC Group 89, Subsistence, March 1978 and requested that the change be reflected into future solicitations. This was accomplished on 16 March 1978 under Solicitation DLA-13-H-78-R1123 with closings beginning 27 March 1978. In effect, however, all offerors were apprised and permitted to offer on the broader color range from 21 March 1979 on. W. H. Moseley was formally informed by the Contracting Officer of the approval of the referenced VECP by letter dated 13 April 1978. This letter requested a breakdown of costs and cost elements involved in processing the items to meet the revised item description be provided. A DD Form 633-5 was furnished to the contractor for this purpose.

B. Regarding the basis on which W. H. Moseley has submitted its claim for a VECP savings award and its evaluation by DPSC-ST, I hereby find as follows:

1. By letter dated 17 April 1978 the W. H. Moseley Company in reply to the Contracting Officer's letter of 13 April 1978 admitted that from a processing point of view, there is no savings to the manufacturer by reason of the color change. In this letter Moseley contended that the large savings will occur because it will enlarge the universe of available product which can be bid against solicitations using this specification. The increased supply against a constant demand would,

according to Moseley, result in a price reduction due to the intensification of competition.

2. By letter dated 5 April 1978 W. H. Moseley Company claimed savings to the Government from March 21, 1978 through April 3, 1978, of $17,474.20 or an average per lb. savings of .01506. These savings were developed by comparing the unit price of the last award to the same destination prior to the specification change (21 March 1979) with the current award price after 21 March 1979. In addition, W. H. Moseley enclosed a chart which showed the savings that were available 3 weeks prior to the specification change using the W. H. Moseley non-responsive offers for the lighter colors as a comparison against the responsive successful awards for the darker specification colors. By this comparison a savings of $50,186.20 or .0221046 per lb. would allegedly have resulted had the Moseley offers been acceptable. W. H. Moseley updated the comparative analysis of savings using the unit price of the last award to the same destination prior to the specification change with the current award price through 20 June 1978 by letters dated 14 April 1978, 12 May 1978, 20 June 1978 and 29 June 1978. Using this method of comparison plus a seasonal adjustment, W. H. Moseley Co. calculated savings of .0147¢ per lb. which when projected over a 3-year purchase period of 106,000,000 lbs. amounted to $1,558,200.00 or a calculated award to Moseley of $779,100.00

3. Pursuant to applicable regulations (Par. VI B 6 DSAR 4140, 21) the above-referenced letters from W. H. Moseley claiming savings by reason of the VECP proposal were furnished to the Technical and QA Division, Office Of the Deputy Commander for Subsistence and Commander for Subsistence Field Activities at DPSC Philadelphia, PA (hereinafter referred to as DPSC-ST) for review and evaluation. By letter dated 14 July 1978 this Office determined that an incentive award was not payable because there was no productive savings. This letter explained that since the Value Engineering Clause measures savings by the unit cost reduction, a contractor is required to submit among other things, a separate detailed cost estimate for both the existing requirement and the proposed change to provide an estimate of the reduction in costs. Accordingly, price reduction based on variable factors, such as increased competition, is not synonymous with unit cost reduction or collateral savings under the Value Engineering Program. The W. H. Moseley Company was informed of this determination by the Con-

tracting Officer by letter dated 17 August 1978. The W. H. Moseley Co. by letter dated 29 August 1978 contested the determination that productive savings was a requirement of the clause J 17 Value Engineering Incentive (DPSC 1976 OCT) and contended that the firm's prior submission based on comparative prices clearly revealed a savings of approximately .0122¢ per lb. By letter dated 26 September 1978 the W. H. Moseley Co. informed the Contracting Officer that future correspondence on the VECP matter was to be directed to Mr. John L. Runft, Attorney, Runft & Longeteig, Chartered, P.O. Box 953, Boise, Idaho.

4. The Contracting Officer by letter dated 12 October 1978 addressed to Mr. John L. Runft (attorney for W.H. Moseley Co.) replied to the W.H. Moseley Co. letter of 29 August 1978. In this letter the Contracting Officer explained what was intended by the term "productive savings". The explanation provided as follows:

a. "Productive savings was the net reduction in costs that may be attributable to your VECP as defined by DAR(ASPR) 1-1701.1". It was pointed out in this letter that the entire Value Engineering concept was aimed at finding areas of cost reduction in the contract.

b. This letter explained that under (a)(ii) of the J 17 V.E. clause in the contract, the clause was applicable to a contractor developed and documented VECP which reduces the overall costs to the cognizant Military Department without impairing essential functions or characteristics. That pertinent to the issues in this case(b)(iii) of the clause pertaining to documentation requires that the following information be submitted by the contractor with each VECP "(b) Documentation. A separate detailed cost estimate for both the existing contract requirement and the proposed change to provide an estimate of the reduction in costs, if any, that will result from acceptance of the VECP, taking into account the costs of development and implementation by the contractor . . . "

c. It was then pointed out that W.H. Moseley by letter dated 17 April 1978 stated that there was no savings to the manufacturer from a processing point of view by reason of the color change and also no labor savings, no engineering savings with material and administrative expenses remaining constant. Further, that the W.H. Moseley Co. based the savings claimed on a price reduction resulting from increased competition.

d. The Contracting Officer further stated in this letter as follows:

> " . . . , a reduction in the market price does not establish entitlement. What must be demonstrated is the elimination or modification of anything that contributes to the cost of a contract item . . . "

The letter advised that the W.H. Moseley Co. was to be afforded an additional opportunity to submit the documentation required by Par. J 17 (b).

5. Mr. Runft by letter dated 25 October 1978 acknowledged receipt of the Contracting Officer's letter of 12 October 1978 and requested an extension of time (60 days) to submit further documentation required by the paragraph J 17 (b) clause of the contract. In addition, a request for the Defense Acquisition Regulations was made. Subsequently by letters dated 27 November 1978, 20 December 1978, 4 January 1979, 29 January 1979, 28 March 1979, and 8 May 1979 Mr. Runft requested additional documentation, records, and information pertaining to the processing of the subject VECP under the Freedom of Information Act (5 U.S.C. 552). The information requested by Mr. Runft was provided. By letters dated 8 June 1979 and 12 June 1979 Mr. Runft requested an extension through 22 June 1979 to submits its final documentation required by the J 17 (b) Value Engineering Incentive clause of the contract.

6. By letter dated 15 June 1979 Runft & Longeteig, attorneys for W.H. Moseley Company, submitted a formal, final documentation on VECP 18-78 consisting of a Memorandum in Support of Claim of Cost Savings Realized and an Evaluation of Value Engineering Change Proposal prepared by economist John W. Mitchell, PhD. In summary, the Memorandum advanced the following contentions:

a. Government regulations and guidelines indicate that a proposed change to any item which will result in overall cost reduction to the procuring agency, even through the cost of the end item itself may increase, will be awarded and the savings to the Government will be shared with the proposer and that there is nothing in the regulations or available guidelines which indicates that the only savings available for award to the contractor for his share are limited to "production savings." An historical analysis was provided to support the position that it is the policy of value engineering to permit the contractor to share in

any savings which the Government realized from his suggestion, whether or not that savings was due to lower production costs, or otherwise.

b. An analysis of V.E. case studies and VECPs and cost savings computation methods was provided. This analysis purportedly disclosed that in more than one case the Government used the actual reduction in price bid to the Government as a criterion for determining the amount of savings to which the contractor was entitled. While conceding the fact that the majority of cases involve the technological type changes and "production type savings" so that there is not an over abundance of precedential value to be gained from these previous awards, the memorandum holds that the case studies make clear that the VECP program is not limited to technological type changes.

c. The "Evaluation of Value Engineering Change Proposal" prepared by the economist John W. Mitchell attached to the Memorandum proposed several approaches to determine overall savings to the Government by reason of the adoption of the color standard change proposed in the Moseley VECP. Essentially this evaluation has proceeded on the basis that expansion of the procurement base by reason of the broadening of the color standards has resulted in a reduction of prices offered by vendors. One measure involved price comparisons during the period 27 February 1978 and 21 March 1978 between Moseley's rejected low bids (not falling within the 0-1 color standard) and the award prices for that period to establish savings. A second measure uses a comparison of the average prices during the three weeks before the change and three weeks after the change. A third measure adopted the comparison previously utilized by W.H. Moseley of using the last award price to the same destination before the change with the award price to that destination after the change. The fourth measure using charts and a monthly index of prices over a three-year period compares prices for the same period prior to and after the VECP change. Each approach is predicated on the assumption that except for the period of 27 February 1978 through 21 March 1978 the USDA was passing great amounts of product in the broad color ranges notwithstanding the specification requirement for product within the 0-1 color range. The range of estimates from the four approaches being $1,293,200 to $2,321,400 with the mean be $1,865,600. Under this 15 June 1979 submission, a claim for a VECP award based on savings

realized by the Government in the amount of $2,321,400 was made by the W.H. Moseley Co.

7. The 15 June 1979 submission of documentation by the W. H. Moseley Co. was forwarded to DPSC-ST for analysis and evaluation on 20 June 1979. The Contracting Officer by letter dated 25 July 1979 to Runft & Longeteig, Attorneys for W. H. Moseley Co., requested additional data for analysis relevant to the economist's attached evaluation under the 15 June 1979 submission. Specifically data to determine how the prices paid by DPSC before and after the color change compared to prices paid by large volume buyers whose color requirements did not change during the comperison period was requested. Mr. Runft by letter dated 30 July 1979 stated he would make every effort to gather and submit the comparison data requested by 1 October 1979.

8. By letter dated 22 September 1979 Mr. John L. Runft, attorney for W. H. Moseley Co., submitted additional documentation consisting of a Supplementary Memorandum in Support of Claim of Cost Savings Realized and a Supplemental Economic Evaluation of the VECP prepared by the economist John W. Mitchell, PhD with exhibits and attachments to each such submission. This submission besides reaffirming the position previously taken with regard to the eligibility for a V.E. award cost savings other than cost of production savings such as savings to DLA due to reduced prices as a direct result of the color standard change under the Moseley VECP also contended that during the January to May 1978 period the posted industry prices did not change nor did the discounting customs or amounts vary and that notwithstanding prior statements to the contrary, the W. H. Moseley Co. did not intend, and does not intend, to categorically state that there were no such savings in the cost of production. In support of the contention that the open market buyers experienced price stability during the referenced comparison period statements from five regional to national food distribution companies were furnished. In addition, an observation was made that some large volume buyers such as MacDonalds, Burger King, Jack-In-The-Box and others contract for frozen French-fried potatoes according to their own specifications and that by the nature of such contracts are somewhat insulated from price fluctuations that would occur in the open market. Accordingly, the large annual contractors also experienced price stability and continuity during the period in question. Other

statements from industry executives were submitted to support the proposition that color range restrictions on Government solicitations cause producers to bid in a fashion that causes the price to increase towards the market price, or above; i.e., bidding at market prices, or above, as opposed to discount pricing on Government bids; the disruption and organizational cost that a company would face in attempting to make special runs of product to meet the restricted color range standard required by Government until 21 March 1978. The Supplemental Economic Evaluation of the VECP by the economist John W. Mitchell, PhD, concluded that on the basis of a survey of French fry industry firms that industry prices were stable throughout the period of February through April 1978. All firms responding to the survey indicated that none of their large volume customers altered their color requirements for frozen French fries during the period February 1, 1978 through April 30, 1978. The evaluation also provided an analysis to establish reasons why a special color run by a packer would result in higher costs. In addition, the evaluation pointed out that the DLA requirement for a darker-colored French fry would be expected to reduce the attractiveness of the DLA market as a place to dispose of inventory, since the probability of having in stock the non-standard, darker color range is considerably lower. The requested data on actual prices paid by large volume buyers whose color requirements did not change during the comparison period was not furnished. Also the contractor never completed or returned the DD F633-5 furnished to him.

9. The Runft and Longeteig, Chartered, letter dated 22 September 1979, providing further documentation on the Moseley VECP was forwarded to DPSC-ST for evaluation on 12 October 1979. Runft and Longeteig, Chartered, were advised by the Contracting Officer of the evaluation being made on their submission and the anticipated completion date of the evaluation and final decision on the VECP award claim by letters dated 29 October 1979 and 1 December 1979, respectively. DPSC-ST completed their evaluation of the W. H. Moseley Co. VECP on 24 January 1980 and the Contracting Officer received their report on 28 January 1980.

10. The report of evaluation from DPSC-ST recommended no award payment for the VECP submitted by W. H. Moseley Co. essentially for the following reasons:

a. W. H. Moseley Co. has not provided a separate detailed cost estimate for both the existing contract requirement and the proposed change which is the only basis for computing savings under the Value Engineering Incentive Clause in the contract. W. H. Moseley Co. has previously stated "From a processing point of view, there is no savings to the manufacturer vis-a-vis this color change." While the intent of this statement has been modified on page 4 of the Supplemental Memorandum to the Runft & Longeteig Chartered's letter of 22 September 1979, the fact remains that the requirement for detailed cost estimate under the VE Clause has not been met.

b. The entire thrust of the W. H. Moseley claim can be summarized by the following premises:

(1) A wider color range would increase competition and thus lower prices.

(2) The prices paid by the Government went down after the color range was changed.

(3) Therefore, the price went down because of the color change.

The DPSC-ST evaluation finds premise b.(1) not valid for the following reasons:

(a) No new vendors received an award after the color change.

(b) There is no knowledge of a producer changing the color of the product they offer to the market either to compete for DPSC business or any other market.

(c) Although the number of bids received on a few line items did increase after the color change, no data was presented to show that the increase was caused by the change and not the other factors prevailing at the time. (See subparagraphs (a) and (b) below.)

The DPSC-ST evaluation found premise b.(2) correct per se. In other words, prices paid by DPSC did go down after the color range was changed but that this decrease was temporary and prices have surpassed the level prior to the change.

The DPSC-ST evaluation considered premise b.(3) to be based on either the law of the single variable or the law of the only significant variable (see Enclosure 1). The DPSC-ST evaluation cited the fol-

lowing among other factors present at the time of the color change to refute the single variable approach considering its effect on standard business practices.

(a) The amount of frozen French-fried potatoes in cold storage was up by 8% over the previous year (see Enclosure 2). W. H. Moseley Co. has not supplied any data to show that there was any increased demand to offset this increased supply.

(b) The Labor Department's production cost index (see Enclosure 3) showed the average cost to produce French fries declined during the same time as the color change and during the same period the previous year. The DPSC-ST evaluation co[illegible]udes that since production costs went down and supply was up, it is impossible for that office to concur in the W. H. Moseley contention that price changes were caused by the change in color range.

c. A review of bid abstracts after the color standard change does not show a significant drop in bid prices by any of the bidders. In view of this and the fact that the highest price ever paid by DPSC on any line item before the change was $.2513 the W. H. Moseley's claim of savings ranging from $2,321,400.00 to $6,500,000.00 on a product with a 3-year estimated procurement quantity of 106,000,000 lbs. is totally unrealistic. Even if this highest price was an average, which it isn't, W. H. Moseley is claiming that the VECP saved the Government between 8.7% and 24.4% of its procurement costs.

C. Additional findings of the Contracting Officer on the Moseley claim for VE award:

1. W. H. Moseley has failed to establish a basic premise on which its claim is grounded. W. H. Moseley Co. contends that in the process of furnishing grade certifications for shipment of French-fried potatoes purchased by DLA, USDA inspectors, prior to late January — early February, 1978, has been routinely misapplying the color standards required under DLA purchase contracts which specified a color range of 0 — 1 on the Munsell color chart. In doing this, the USDA had allegedly passed and certified great amounts of product which should not have been passed. No support for this contention has been furnished. Primarily Moseley supports his claim for savings on the basis of the chart's depicting average prices paid by DPSC by month for the years 1976, 1977, and 1978 as shown on pp. 11 and 12 of the evaluation prepared by his economist back in June 1979. The

crucial period from the contractor's viewpoint being from January through April in the chart for 1978 on the premise that 1976 and 1977 reflect average prices by month paid by DPSC for potatoes ranging in color from #1 to #000 due to the misapplication of USDA inspectors of the required color standards. The sharp rise in prices from January to March 1978 in comparison to the same period for 1976 and 1977 the contractor attributes to the enforcement of the specifications by USDA with the drop in average prices from March to April resulting from again widening the color range to #000 to #1 by reason of the VE specification change. While W. H. Moseley has failed to establish this premise, (the non-enforcement of color standards by USDA), available information indicates that except for a few isolated instances, only the W. H. Moseley Co. furnished non-conforming product in the wider color range contrary to contract specifications. The Contracting Officer was not aware that the W. H. Moseley Co. was furnishing non-conforming product until the matter was raised in the course of this VECP matter.

2. For the period at least from 1 October 1977 through 31 January 1978 the W. H. Moseley Co. under at least eleven (11) contracts with DSR-PAC delivered French-fried potatoes with a color range of either 00 — 0 or 000 — 0, whereas the specifications under all such contracts required a color range of 0 — 1. A Contracting Officer lacks authority to waive contract rights of the U.S. Government if such a waiver would permit savings to the contractor. The Contracting Officer has not heretofore sought a price reduction from the W. H. Moseley Co. under the aforementioned contracts due to her belief that there was no cost savings in furnishing the lighter-colored product. For the same reason, the Contracting Officer does not consider that the W. H. Moseley Co. had an unfair competitive advantage over the other bidders who bid and furnished the darker colored product in accordance with specifications.

3. An analysis of the bids as submitted by the Moseley Company during the alleged enforcement period and during the period that DPSC was considering the adoption of its VE proposal discloses that those bid prices were unusually low in price but were submitted on a basis of furnishing supplies not conforming to the advertised specifications and which, therefore, were not open for consideration and acceptance. Since the W. H. Moseley Co. bids were non-responsive and therefore could not have resulted in an award, such bids cannot

be considered as an objective criterion as to what Moseley would have bid had it been eligible for an award. It is the opinion of the Contracting Officer that these bid prices were therefore illusory and were submitted solely for the purpose of inducing the Government to accept the VE proposal.

If it is claimed, on the other hand, that these bid prices were realistic, that the Moseley Company could have profitably performed had the Government accepted those prices and that, therefore, these prices may be used to represent the differential the Government would save if it adopted the VE proposal, then it is significant to note that what occurred with respect to the bid prices of Moseley after the Government accepted the VE proposal; in other words, where its bids on furnishing the broader color range made its bids available for acceptance. It would be reasonable to presume that the bids of Moseley would have remained constant during the period immediately before and immediately after the acceptance of its VE proposal inasmuch as Moseley was bidding on the same broad color range continuously throughout this period. An analysis of the 19 bids as submitted by Moseley immediately prior to the acceptance of the VE proposal and at a time when adoption thereof was under consideration by the Government discloses that such bid prices ranged from .1795 per pound to .2097 per pound, with an average of .1985 per pound, whereas analysis of the same number of bids submitted by Moseley immediately after the VE proposal and at a time when Moseley would have been required to have performed and delivered product at the prices bid discloses that those prices ranged from .2020 per pound through .2424 per pound, with an average price of .2151 per pound. If the Government was to predicate a VE award on the basis of Moseley's peculiar bid prices to the Government, therefore, it is obvious that no entitlement would ensue inasmuch as Moseley's bid prices did not decrease after adoption of the VE proposal; on the contrary, Moseley's bid prices to the Government *increased* as a consequence of adoption of its VE proposal.

4. A review of the bid abstracts for solicitations issued after the VE specification change discloses that some bidders who bid lower than Moseley and received the award furnished the darker colors while some bidders who received awards offered the same price for both the darker and lighter colors. A review of 1978 and 1979 AMERICAN INSTITUTE FOOD DISTRIBUTION reports on food

markets discloses little if any price difference between lighter and darker colored products.

5. The evaluation submitted by W. H. Moseley Company addresses costs to a producer in attempting to make special runs of product to meet the restricted color range standards required by the Government until 21 March 1978. This is an academic exercise. All producers have the ability to make what the market requires, and are not in the position of looking for a market for a limited range of colors the producer can make. Clearly, the analysis of the Table on page 7 "Food Service Production or Sales by Color Range" indicates that upward of 25% of the total production was in the color range 0 — 1. One could conclude that the DPSC requirements were not unique and did not dominate the market. Accordingly, its requirement, in comparison to total demand, could be readily accommodated by the market place. In addition, it is apparent from the referenced Table that Ore-Ida is the leading producer in the 0 — 1 color range and has little competition. With such a large market share marketing strategies would indicate that competitors not compete head-on with Ore-Ida simply to meet DPSC's limited demands.

II. DETERMINATION AND DECISION OF CONTRACTING OFFICER

Based on the above findings, it is the determination of the Contracting Officer that:

A. The W. H. Moseley Company has not met the requirements of the Value Engineering clause (J 17) of the contract by providing the data required under (b)(iii) therein to establish the unit cost reduction of the VECP under the contract. According to the W. H. Moseley Company submissions, the USDA was not enforcing the DPSC contractual requirement for #0 — #1 color product during 1976 and 1977 and also in 1978 up until late January or early February of that year. As a result DPSC was allegedly receiving product in the broad color range just as if the VECP change had been in effect throughout this period. The period of USDA enforcement of the specification requirement for #0 — #1 color was, according to the contractor, from late January or early February 1978 through 21 March 1978 at which time the VECP change was implemented. In other words, W. H. Moseley Company alleges that the restricted specification was enforced and impacted DPSC procurements for a period of approxi-

mately six weeks. The VECP therefore served to restore the situation with respect to the color range of product being furnished to DPSC to what it had allegedly always been prior to enforcement of the color range by USDA. For providing a VECP suggestion to change a restrictive specification standard due to USDA enforcement practices that allegedly were only in effect six weeks, (a premise that W. H. Moseley Company has not, as a matter of fact, established), the W. H. Moseley Company claims a saving award of between $1,160,700.00 to $3,250,000.00 based on Government savings of $2,321,400.00 to $6,500,000.00. The savings claimed by the W. H. Moseley Company has not been computed in accordance with the terms of the VE Incentive clause of the contract but on a theory of price reductions resulting from an expanded procurement base with a concomitant intensification of competition. Since the contractor's basis for savings does not conform with the method of establishing savings provided under the clause, the contractor wants the clear provisions of the clause to be ignored or read to fit its presentation based on alleged savings resulting from increased competition.

The contractor, however, like the Government is bound by the terms and conditions of the contract that it entered into. It was the contractor who initiated and persisted with inquiries aimed at getting the Government to relax its color standards so that the contractor's non-conforming product could qualify for awards and be accepted. A VECP proposal was the vehicle used to achieve this objective. The W. H. Moseley Company suffered no hardship or loss by submitting the VECP proposal. On the contrary, the submission and subsequent acceptance of the VECP proposal served the interest of the W. H. Moseley Company who consistently furnished product in the lighter color range. The Government by accepting the VECP is bound under the terms of the VE clause to award savings establishing pursuant to that clause. There exists therefore no contractual or equitable basis for the Government to make a savings award to W. H. Moseley Company on any basis other than that specified under the VE clause of the contract. To do otherwise would be an unwarranted waiver of the Government's rights under the contract.

B. Even if the VE clause was written to provide for a reward for savings based on a broadening of the procurement base as a result of a VECP, the W. H. Moseley Company has failed to establish such savings. No quantitative data has been furnished by the W. H. Moseley

Company nor has any inquiry made by the Contracting Officer established that price of French-fried potatoes is based on color; or that color effects production costs; or that any new vendor became interested in DPSC potato procurements and commenced to bid after the change in color; or that any previous producer or bidder to DPSC changed the color of its product as delivered to the Government as a consequence of the adoption of the VE proposal; nor has W. H. Moseley explained why its own pricing to the Government increased immediately after the adoption of the VE proposal; nor to the extent that the individual pricing of competing bidders after adoption of the VE proposal followed patterns of being higher or lower than prices submitted prior to adoption of the VE proposal, that any sporatic decreases within individual bids of competing firms were occasioned solely by reason of the change in the color requirements, and not occasioned by increased supply, decreasing demand, or numerous other economic factors that may influence price. A wide range of factors influence a company's price policy. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact. A business manager may be unable to state that had one fact been different he would have chosen a different price.

It is therefore the Contracting Officer's final decision that there is no basis to grant a VECP monetary award to the W. H. Moseley Company under VECP-18-78 which was submitted by that firm under the subject contract. This notice constitutes a final decision by the Contracting Officer the the W. H. Moseley Company request for a VECP savings award under the hereinbefore referenced letter submissions is denied.

III. CONTRACTOR APPEAL RIGHTS

This is the final decision of the Contracting Officer. Decisions on disputed questions of fact and on other questions that are subject to the procedure of the Disputes clause may be appealed in accordance with the provisions of the Disputes clause. If you decide to make such an appeal from this decision, written notice thereon (in triplicate) must be mailed or otherwise furnished to the Contracting Officer within thirty days from the date you receive this decision. Such notice should indicate that an appeal is intended and should reference this decision and identify the contract by number. The Armed Services Board of Contract Appeals is the authorized representative of the Secretary for hearing and determining such disputes. The Rules of the

Armed Services Board of Contract Appeals are set forth in the Armed Services Procurement Regulation, Appendix A, Part 2.

In addition, Section 16 of the Contract Disputes Act of 1978, Pub. L. No. 95-563, enacted November 1, 1978, 92 Stat 2383, 41 U.S.C. 601-613, which became effective March 1, 1979, confers upon contractors a right to elect to proceed under the Act instead of under the Disputes clause as aforesaid. Should you elect to proceed under that Act, written notice thereof must be mailed or otherwise furnished to the Armed Services Board of Contract Appeals, 200 Stovall Street, Hoffman Building II, Alexandria, Virginia 22332, in accordance with its rules, within ninety days from the date you receive this decision. Also, a copy thereof shall be furnished to the Contracting Officer.

Such notice shall indicate that an appeal is intended under the Contract Disputes Act of 1978 and should reference this decision and identify the contract by number. In lieu of appealing to the Armed Services Board of Contract Appeals, you may, under said Act, bring an action directly in the United States Court of Claims within twelve (12) months from the date you receive this decision. Such action must be filed in accordance with the Rules of that Court.

If the Contract Disputes Act is applicable to your appeal, an optional accelerated procedure is available if the disputed amount is $50,000. or less and you elect that procedure. Alternatively, if the amount in dispute is $10,000. or less, you may elect to have the appeal processed under an expedited small claims procedure also made available by the Contract Disputes Act. Both the revised accelerated procedure and the new, alternative small claims expedited procedure are described in the supplement to Board Rule 12. This supplement provides for a 180-day limit on processing accelerated procedure cases and a 120-day limit on processing small claims expedited procedure cases.

Sincerely,

META LUND
Contracting Officer

3 Encls

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/P

15 February 1980

Runft and Longeteig, Chartered
Attorneys and Counsel at Law
420 West Bannock Street
Boise, Idaho 83701

SUBJECT: Notice of Contracting Officer's Decision — VECP 18-78 under Contract DLA137-78-C-CH32

Gentlemen:

My letter regarding subject as above was inadvertently dated, 6 January 1980, and should have been dated, 6 February 1980.

Kindly adjust the letter accordingly.

Sincerely,

META LUND
Contracting Officer

EXHIBIT L

RUNFT & LONGETEIG, CHARTERED
ATTORNEYS & COUNSELORS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 953
BOISE, IDAHO 83701

JOHN L. RUNFT
IVER J. LONGETEIG
DAVID J. STECHER
TERRY E. COFFIN
JOHN F. ADLARD
W. HUGH O'RIORDAN

TELEPHONE
(208) 345-6521

December 31, 1980

Ms. Meta Lund, Contracting Officer
Defense Logistics Agency
Defense Subsistence Region Pacific
2155 Mariner Square Loop
Alameda, California 94501

Re: Value Engineering Change Proposal (VECP) DPSC-S-VECP 18-78, W.H. Moseley Company, Boise, Idaho, DLA 137-78-C-CH32

Dear Ms. Lund:

Enclosed please find a Certification of Good Faith filing relative to the above claim. Please file the enclosed Certification in your file in this matter on behalf of the W. H. Moseley Company, Inc.

In our appeal of your final decision in this matter, the Justice Department has claimed that the contractor failed to properly certify its claim under 41 U.S.C. §605(c)(1) while the matter was before you, and that the Court has no jurisdiction on any appeal from your decision. We dispute the Justice Department's position on this issue. It is our position that your decision was final and constituted acceptance of jurisdiction by the United States.

However, as a precaution, the contractor is herewith filing the enclosed Certification with you as the contracting officer for the purpose of perfecting its claim in order to render your decision final and appealable and to create jurisdiction in the Court of Claims accordingly.

Very truly yours,

JOHN L. RUNFT

JLR/lp

encl.

EXHIBIT M

RUNFT, STECHER & COFFIN, CHARTERED
ATTORNEYS & COUNSELORS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 1960
BOISE, IDAHO 83701

JOHN L. RUNFT
DAVID J. STECHER
TERRY E. COFFIN
JOHN F. ADLARD
W. HUGH O'RIORDAN

TELEPHONE
(208) 345-6521

Iver J. Longeteig
of Counsel

April 12, 1982

Ms. Meta Lund
Contracting Officer
Defense Logistics Agency
Defense Subsistance Region Pacific
2155 Mariner Square Loop
Alameda, California 94501

Re: Value Engineering Change Proposal (VECP) DPSC-S-VECP 18-78, W.H. Moseley Company, Boise, Idaho, DLA 137-78-C-CH32

Dear Ms. Lund:

For your ready reference I am enclosing herewith a copy of an order of the United States Court of Claims dismissing Case No. 56-81, W.H. Moseley Company, Inc. v. United States, entered by the court on March 23, 1982. The court decided that the claim of the W.H. Moseley Company, Inc. was not properly certified prior to your decision in the above referenced matter on February 6, 1980; that such certification is a jurisdictional pre-requisite to an appeal directly from your decision to the United States Court of Claims; and that "'contracting officers are not empowered to 'waive a requirement that Congress imposed'" (pg.6). In other words, the fact that you entered

a decision before the W.H. Moseley Company filed a formal certification was held by the court not to be a waiver of that requirement for direct appeal to the Court of Claims, despite the fact that the last page of your decision advises that such an appeal to the Court of Claims was available.

In light of the court's decision, it is clear that no final decision has yet been issued in this matter by your office in accordance with the provisions of 41 U.S.C. Section 605(c). Subparts (1) and (2) thereof provide as follows:

> (1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within 60 days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000 the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.
>
> (2) A contracting officer shall, within 60 days of receipt of a submitted certified claim over $50,000 —
>
> (A) issue a decision; or
>
> (B) notify the contractor of the time within which a decision will be issued.

It was the position of the W.H. Moseley Company, and so argued to the Court of Claims, that the extensive record itself constituted sufficient certification and that the issuance of the contracting officer's decision complied with the statute. However, the Court of Claims has held in this matter to the contrary, and, further, that your decision as contracting officer could not waive the requirement of certification for the reason that it is jurisdictional in nature.

On December 31, 1980, the W.H. Moseley Company filed a formal "certification of good faith" in an effort to assist the position of the W.H. Moseley Company before the court. Now that the Court of Claims has ruled in this matter, the W.H. Moseley Company herewith formally requests under and pursuant to the provisions of 41 U.S.C. Section 605(c) to issue a final decision in the above referenced matter. If in your opinion the formal certification heretofor filed

on December 31, 1980, is lacking or insufficient in any respect, please advise the undersigned and a correct certification will be filed so as to comply accordingly prior to the issuance of any final decision by your office.

Again, thank you for your courtesy in this matter.

Very truly yours,

JOHN L. RUNFT

JLR:kd
Enclosure
cc: W. H. Moseley Co., Inc.

RUNFT, STECHER & COFFIN, CHARTERED
ATTORNEYS & COUNSELORS AT LAW
420 WEST BANNOCK STREET
P. O. BOX 1960
BOISE, IDAHO 83701

JOHN L. RUNFT
DAVID J. STECHER
TERRY E. COFFIN
JOHN F. ADLARD
W. HUGH O'RIORDAN

TELEPHONE
(208) 345-6521

Iver J. Longeteig
of Counsel

April 20, 1982

Ms. Meta Lund
Contracting Officer
Defense Logistics Agency
Defense Subsistence Region Pacific

2155 Mariner Square Loop
Alameda, California 94501

Re: VECP DPSC-S-VECP 18-78
W. H. Moseley Co.
DLA-137-78C-CH32

Dear Ms. Lund:

I am in receipt of your letter dated April 15, 1982.

In order that no misunderstanding could arise from a typographical error present in my letter to you of April 12, 1982, let me confirm in that respect that the W.H. Moseley Co. requests under and pursuant to the provisions of 41 U.S.C. § 605(c) that you, as contracting officer in this matter, issue to the W.H. Moseley Co. a final decision in the above referenced matter. This request is in conjunction with and is a part of my letter to you of April 12, 1982.

Very truly yours,

JOHN L. RUNFT

JLR:nh
cc: W. H. Moseley Co.

EXHIBIT N

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/P

15 April 1982

Mr. John L. Runft
Attorney at Law
420 West Bannock Street
P.O. Box 1960
Boise, Idaho 87301

Re: VECP DPSC-S-VECP 18-78,
W. H. Moseley Co.
DLA-137-78C-CH32

Dear Mr. Runft:

Receipt of your letter dated 12 April 1982 is hereby acknowledged. Your letter has been submitted for legal review and advice.

I will reply to the matters addressed in your letter as soon as possible.

Sincerely,

META LUND
Contracting Officer

EXHIBIT O

DEFENSE LOGISTICS AGENCY
DEFENSE SUBSISTENCE REGION PACIFIC
2155 MARINER SQUARE LOOP
ALAMEDA, CALIFORNIA 94501

IN REPLY REFER TO
DSR-PAC/P

14 May 1982

John L. Runft, Esq.
RUNFT, STECHER & COFFIN
Attorneys at Law
420 West Bannock Street
P.O. Box 1960
Boise, Idaho 83701

Re: VECP DPSC-S-VECP 18-78
W. H. Moseley Co.
DLA 137-78C-CH32

Dear Mr. Runft:

This is in reply to your letters dated 12 April 1982 and 20 April 1982.

A review of the Court of Claims Order and Decision in your case (*W.H. Moseley Co., Inc. v. the United States* in the United States Court of Claims No. 56-81 decided on April 21, 1982), as well as the Lehman case referenced therein, clearly sets forth a holding by the Court that your client's failure to certify his claim as required by Section 6 (c)(1) of the Contract Disputes Act of 1978 precludes any appeal under that Act from my decision of 6 February 1980.

A valid final decision in this matter was issued to the W.H. Moseley Company on 6 February 1980 under the Disputes clause of the contract.

Sincerely,

META LUND
Contracting Officer